Privy Council Appeal No. 48 *of* 1938

Attorney General of Alberta - - - - *Appellant*

v.

Attorney General of Canada and others - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

REASONS FOR THE JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JULY, 1938.

Present at the Hearing:

THE LORD CHANCELLOR
(LORD MAUGHAM).
LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* THE LORD CHANCELLOR.]

This is an appeal by the Attorney-General of Alberta from a judgment of the Supreme Court of Canada (Duff C.J., Cannon, Crocket, Davis, Kerwin and Hudson JJ.) dated 4th March, 1938, on a reference to them by the Governor-General of Canada under section 55 of the Supreme Court Act (Revised Statutes of Canada, 1927, c. 35). The subject of the reference and of this appeal is the power of the Legislature of the Province of Alberta to enact three Bills which had been presented to the Lieutenant-Governor of Alberta for assent on 5th October, 1937, and reserved by him for the signification of the Governor-General's pleasure.

By Order in Council dated 2nd November, 1937, the Governor-General referred the following questions to the Supreme Court of Canada for hearing and consideration:—

> "1. Is Bill No. 1, entitled 'An Act respecting the Taxation of Banks' or any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the Legislature of the Province of Alberta?"
>
> "2. Is Bill No. 8, entitled 'An Act to amend and Consolidate the Credit of Alberta Regulation Act' or any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the Legislature of the Province of Alberta?"
>
> "3. Is Bill No. 9, entitled 'An Act to ensure the Publication of Accurate News and Information' or any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the Legislature of the Province of Alberta?"

By the judgment of the Supreme Court dated 4th March, 1938, the unanimous opinion of the Court on each of the three questions propounded was that it should be answered in the negative.

It is necessary to set out briefly the scope of the disputed Bills.

Bill No. 1, *entitled "An Act respecting the Taxation of Banks".*

This Bill applied to every corporation or joint stock company other than the Bank of Canada incorporated for the purpose of doing banking or savings bank business and transacting such business in the Province. The Bill imposed upon every such bank an annual tax, in addition to any tax payable under any other Act, of (*a*) ½ per cent. on the paid-up capital and (*b*) 1 per cent. on the reserve fund and undivided profits. Default on payment of tax was to be visited with penalties, and payment of either tax or penalty could be enforced by distress and sale of goods and chattels, or by action for civil debt. The tax was declared to be payable to the Provincial Secretary on behalf of His Majesty for the use of the Province. It is important to note that the tax is calculated by reference to the whole of the paid-up capital and reserves made throughout Canada and abroad.

Bill No. 8, *entitled "An Act to Amend and Consolidate the Credit of Alberta Regulation Act,* 1937".

This Bill applied to "credit institutions," that is persons or corporations whose business was that of dealing in credit. Such business was defined in the Bill.

The Bill required credit institutions carrying on business in the Province to take out licences from the Provincial Credit Commission constituted by section 4 of the Alberta Social Credit Act. Applications for licences were to be accompanied by an undertaking signed by the applicant to refrain from acting or assisting or encouraging any person to act in a manner which restricts or interferes with the property and civil rights of any person in the Province. A breach of this undertaking might be visited by the Provincial Credit Commission with suspension or revocation of the licence, subject to a right of appeal to the Social Credit Board constituted by the above-mentioned Social Credit Act.

Before a licence was granted to a credit institution, one or more Local Directorates were to be appointed to supervise, direct and control the policy of the institution's dealing in credit for the purpose of preventing any act constituting a restriction or interference with full enjoyment of property and civil rights by any person within the Province. A Local Directorate was to consist of a majority appointed and removable by the Social Credit Board and a minority appointed and removable by the credit institution.

But it was expressly provided that no provisions of the Act should be so construed as to authorise the doing of any act or thing which is not within the legislative competence of the Provincial Legislature.

Bill No. 9, entitled "An Act to ensure the Publication of Accurate News and Information".

This Bill applied to newspapers or periodicals published in the Province. Where any such paper had published a statement relating to any policy or activity of the Provincial Government, the proprietor, editor, publisher or manager was to be bound, when so required by the Chairman of the Social Credit Board, to publish in the paper a statement of no greater length than and of equal prominence and type with the previous statement. The object of the Chairman's statement was to be the correction or amplification of the previous statement and it was to be stated that it was published by his direction.

The Bill further provided that the proprietor, editor, publisher or manager of a paper should be obliged on requisition of the Chairman of the Social Credit Board to divulge the particulars of every source of information upon which any statement appearing in his paper was based.

Any contravention of the provisions of the Bill was liable to be punished by money penalties and might entail the suspension of the paper or part of its material.

At the time when the three questions above stated were before the Supreme Court an Act entitled the Alberta Social Credit Act, Chap. 10, 1937 (First Session) was in force. It had received the assent of the Lieutenant-Governor of Alberta on the 14th April, 1937, and had been later amended by an Act assented to on the 6th August of that year. The provisions of this Act as amended necessarily called for the careful examination of the Supreme Court, since the two Bills No. 8 and No. 9 could operate only if certain institutions created by and working under the Alberta Social Credit Act, i.e., the Provincial Credit Commission and the Social Credit Board, were in existence. Bill No. 8 required credit institutions carrying on business in the Province to obtain licences from the Provincial Credit Commission. That body in the circumstances mentioned in the Alberta Social Credit Act could suspend or revoke any licence, subject to a right of appeal to the Social Credit Board. As regards Bill No. 9, the Social Credit Board was entrusted with the most important duties under the Bill. It has happened, however, that since the order of the Supreme Court, namely, on the 8th April, 1938, the Alberta Social Credit Act was repealed by the Alberta Legislature (1938, chap. 4). In these circumstances the two Bills No. 8 and No. 9 cannot now be brought into operation, and since nothing can be done thereunder, the appeal from the order of the Supreme Court is one of no practical interest. It is contrary to the long-established practice of this Board to entertain appeals which have no relation to existing rights created or purported to be created; and they have, therefore, found it necessary to decline to hear arguments on this appeal in so far as it relates to Bills No. 8 and No. 9. Their Lordships in taking this course will only add that they do not intend to intimate any doubt as to the correctness of the decision of the Supreme Court as regards those Bills.

Bill No. 1, the "Act respecting the Taxation of Banks" is in a position different from that of the other two Bills. It contains no reference to the Alberta Social Credit Act. It purports to be concerned with taxation of a direct character, differing however from ordinary taxing statutes in that it singles out for taxation only banks which transact business in the Province. The word "bank" is defined as meaning "a corporation or joint stock company other than the Bank of Canada wherever incorporated and which is incorporated for the purpose of doing banking business or the business of a savings bank and which transacts such business in the Province whether the head office is situate in the Province and elsewhere." No other body, corporation, institution or person is the subject of taxation under the Bill. It is sought to be justified by section 92 (2) of the British North America Act as being within the class of subjects described as "direct taxation within the Province in order to the raising of a revenue for provincial purposes." It may be stated at the outset, if indeed it is not self-evident, that the mere fact that revenue to a greater or smaller amount would be raised in the Province by a highly selective measure of this unusual character is not sufficient to justify it as coming within section 92. Under the guise of discriminatory taxation in the Province it would be easy not only to impair, but even to render wholly nugatory the exclusive legislative authority of the Dominion over a number of the classes of subjects specifically mentioned in section 91 by making them valueless. Instances could be found in bills of exchange, and promissory notes, patents, and copyrights, which could be so heavily taxed as entirely to destroy their use as well as their value in the Province. A number of other illustrations could be given arising under section 92 (10). No one would suggest—and certainly counsel for the appellants in his able argument did not—that provincial legislation of this character would be valid. Whether a Provincial Act, which indirectly interferes in some degree with one of the powers of the Dominion, is or is not *ultra vires* must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down (*John Deere Plow Co., Ltd.* v. *Wharton,* [1915] A.C. 330 at pp. 338, 339; *Great West Saddlery Co.* v. *The King,* [1921] 2 A.C. 91).

There are cases on each side of the line. For example, the decision of the Judicial Committee in *Russell* v. *The Queen* (7 App. Cas. 829) is an authority on one side; the decisions in *Abbott* v. *City of Saint John* (1908) 40 Can. S.C.R. 597, *Forbes* v. *Attorney-General of Manitoba,* [1937] A.C. 260, and *Saskatchewan Judges* v. *Attorney-General of Saskatchewan,* (1937) 2 D.L.R. 209, may be cited on the other side. In the view of their Lordships these cases in no way conflict.

Admitting that a test applicable to every case of overlapping powers specified in sections 91 and 92 is more than elusive, yet it is often comparatively easy to determine that

the particular piece of legislation is an encroachment on a forbidden territory.

Some propositions may be stated that are not in dispute. Clearly it is necessary in dealing with such a question to consider the whole scheme for distribution of powers contained in the two sections. The "classes of subjects" enumerated, looked at singly, overlap in many respects. It is obvious, for example, that currency, paper money, patents, trade-marks and so forth are different kinds of property and therefore as a matter of verbal definition within section 92 (13); but this occasions no logical difficulty, for, as has been repeatedly observed, the concluding paragraph of section 91 declares that any matter coming within any of the classes of subjects enumerated in that section "shall not be deemed to come within the class of matters of a local and private nature" assigned exclusively to the provinces. As pointed out in the judgment of Duff C.J. (concurred in by Davis J.) it is well established that if a given subject matter falls within any class of subjects enumerated in section 91, it cannot be treated as covered by any of those within section 92. (*Attorney General for Ontario* v. *Attorney General for Canada*, [1896] A.C. 348; *Great West Saddlery Co.* v. *The King* (*supra*) at p. 99.)

It is therefore necessary to compare the two complete lists of categories with a view to ascertaining whether the legislation in question fairly considered falls *prima facie* within section 91 rather than within section 92. The result of the comparison will not by itself be conclusive, but it will go some way to supply an answer to the problem which has to be solved.

The next step in a case of difficulty will be to examine the effect of the legislation (*Union Colliery Co. of B.C., Ltd.* v. *Bryden*, [1899] A.C. 580). For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be. Clearly the Acts passed by the Provincial legislature may be considered, for it is often impossible to determine the effect of the Act under examination without taking into account any other Act operating or intended to operate or recently operating in the Province.

A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question. The language of section 92 (2), "direct taxation within the Province *in order to the raising of a revenue* for Provincial purposes" is sufficient in the present case to establish this proposition. The principle, however, has a wider application. It is not competent either for the Dominion or a Province under the guise or the pretence or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other. (*Attorney General for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328, at p. 342; *in re Insurance Act of Canada*, [1932] A.C. 41.) Here again matters of which the

Court would take judicial notice must be borne in mind, and other evidence in a case which calls for it. It must be remembered that the object or purpose of the Act, in so far as it does not plainly appear from its terms and its probable effect, is that of an incorporeal entity, namely, the legislature, and generally speaking the speeches of individuals would have little evidential weight.

If these principles are borne in mind, it appears to their Lordships, as it appeared to the Supreme Court, that the specific question that arises in relation to the Bill No. 1 presents no serious difficulty. In the first place it is plain that the taxation is aimed simply at banks, including savings banks; and by section 91 "banking" and "savings banks" are within the exclusive legislative authority of the Dominion. On the other hand it is strange to find the Province singling out, "in order to the raising of a revenue for provincial purposes," banks and savings banks and no other wealthy corporation, body or persons in the Province.

Next, if the effect of the Bill is examined on the footing that it becomes operative in the Province, some remarkable facts emerge. As Kerwin J. (in a judgment concurred in by Crocket J.) observed:—

> "Our attention has been called to the increase in the taxation of banks that would be effected by the provisions of this Bill. As Provincial legislation stood prior to the First Session of the Alberta Legislature in 1937, the tax on all banks doing business in the Province amounted to $72,200 per annum. By chapter 57 of that session a tax was imposed which would increase the sum realised by $140,000 per annum. The additional tax proposed by Bill 1 amounts to $2,081,925 in each year."

It does not seem to be necessary to set out the undisputed tables of figures showing the particulars of this gigantic increase in the taxation of banks within the Province. Their Lordships do not disagree with the Chief Justice and Davis J. that the facts are sufficient "to show that such a rate of taxation must be prohibitive in fact and must be known to the Alberta Legislature to be prohibitive." In coming to this conclusion it seems to their Lordships that the learned judges were justified in considering that the magnitude of the tax proposed for Alberta was such that if it were applied by each of the other provinces, it would have the effect of preventing banks from carrying on their businesses. It would be strange if each of the provinces were successively to tax banks and the result on the question of *ultra vires* were to be that the Acts of those provinces who were earliest in the field were valid, whilst the Acts of those who came a little later, were to be held *ultra vires*. It must be remembered in this connection that the tax proposed is based on the paid-up capitals and on the reserve funds of the banks wherever situate.

It was rightly contended on behalf of the appellant that the Supreme Court and the Board have no concern with the wisdom of the legislature whose Bill is attacked; and it was urged that it would be a dangerous precedent to allow the views of members of the Court as to the serious consequences of excessive taxation on banks to lead to a

conclusion that the Bill is *ultra vires*. Their Lordships do not agree that this argument should prevail in a case where the taxation in a practical business sense is prohibitive. If, however, any doubt could be entertained on the question of fact, there is in this case a further point which seems to their Lordships to be decisive.

In their opinion it was quite legitimate to look at the legislative history of Alberta as leading up to the measure in question, including the attempt to create a new economic era in the Province. At the time when the Bill was passing through the legislature the most profound and far-reaching changes in the operations of commerce, trade, and finance were intended by Bills before the provincial legislature and by Acts already passed. It was plain that banks and savings banks operating in Alberta might greatly interfere with those proposed changes. The examination of the Province of Alberta Social Credit Act leaves little doubt that the Act was an attempt to regulate and control banks and banking in the Province. In the second 1937 session an Act called "The Credit of Alberta Regulation Act" was passed. The recitals in that Act are as follows:—

> "Whereas the extent to which property and civil rights in the Province may be enjoyed depends upon the principles governing the monetization of credit and the means whereby such credit is made available to the Province and to the People collectively and individually of the Province; and
>
> "Whereas it is expedient that the business of banking in Alberta shall be controlled with the object of attaining for the People of Alberta the full enjoyment of property and civil rights in the Province."

In the same session an Act entitled "An Act to provide for the Restriction of the Civil Rights of Certain Persons" was passed, and it contains a similar recital. Both these latter Acts were part of the general scheme of social credit legislation in Alberta. Their Lordships agree with the opinion expressed by Kerwin J. (concurred in by Crocket J.) that there is no escape from the conclusion that, instead of being in any true sense taxation in order to the raising of a revenue for Provincial purposes, the Bill No. 1 is merely "part of a legislative plan to prevent the operation within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada." This is a sufficient ground for holding that the Bill is *ultra vires*.

There are other and narrower grounds on which the validity of Bill No. 1 has been attacked; but in view of the above conclusions it does not seem to be necessary to deal with them in any way.

Their Lordships think, however, that it may be useful to make some observations on the well-known and often cited decision of the Board in the *Bank of Toronto* v. *Lambe*, (12 App. Cas. 575). That case seems to have occasioned a difficulty in the minds of some of the learned Judges in the

Supreme Court. It must, however, be borne in mind that the Quebec Act in that case was attacked on two specific grounds, first, that the tax was not "taxation within the province," and secondly, that the tax was not a "direct tax." It was never suggested, and there seems to have been no ground for suggesting, that the Act was by its effect calculated to encroach upon the classes of matters exclusively within the Dominion powers. Nor, on the other hand, was there any contention, however faint or tentative, that the purpose of the Act was anything other than the legitimate one of raising a revenue for Provincial needs.

It is moreover important to note that the taxes were not directed against a particular class of business or employment, but were imposed within the Province on every bank, insurance company, incorporated company carrying on any labour, trade or business in the province, and on a number of other specified companies. Nor was it suggested that the taxation was of such a character that it might hamper the Dominion in exercising their powers under section 91. In these circumstances Lord Hobhouse, in delivering the judgment, refuted a contention on behalf of the appellants (12 App. Cas. at pp. 586-7) in language which, as it seems to their Lordships, has sometimes been misunderstood. Its true meaning may be appreciated by stating in effect the argument to which it was addressed in the following form:—"A bank is an institution which comes within the words of section 91 (15). To tax a bank with sufficient severity would destroy it. Therefore the province cannot tax a bank at all." The answer of the Judicial Committee in substance was no more than this:—"You are asking the Board to imply in section 91 a proviso to the effect that if a power expressly given to the provinces is capable, by a particular and unusual application, of infringing a power given to the Parliament of Canada, then no similar use of the provincial power, however moderate, can be permitted under any circumstances. The answer is that the legislature in passing the British North America Act did not assume that a misuse of the provincial powers was likely to occur and accordingly had to be provided for. No such proviso can therefore be implied." It was never laid down by the Board that if such a use was attempted to be made of the provincial power as materially to interfere with the Dominion power, the action of the province would be *intra vires*. To quote the actual language of the Board, they said (p. 587):—

> "If (the Judges) find that on the due construction of the Act, a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion parliament."

This proposition is no more than what was stated in precise terms by Davies J. in the case of *Abbott* v. *City of Saint John* (*supra* at p. 606) when he observed:—

> "Time and again the Judicial Committee have declined to give effect to this anticipatory argument or to assume to refuse to

> declare a power existed in the legislature of the province simply because its improvident exercise might bring it into conflict with an existing power of the Dominion."

Their Lordships are not aware of any decision of the Board which travels beyond the proposition laid down in *Lambe's* case as explained above.

Their Lordships were invited to deal with the question of costs; but on the whole they did not think it right to depart from the usual practice which has obtained in deciding constitutional questions of the nature of those arising in this case.

The above were the reasons which influenced their Lordships in humbly tendering to His Majesty their advice to dismiss the appeal.

(11810—3A) Wt. 8108—30 130 11 38 P. St. G. 130

In the Privy Council.

ATTORNEY GENERAL OF ALBERTA

v.

ATTORNEY GENERAL OF CANADA AND OTHERS

DELIVERED BY THE LORD CHANCELLOR

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1938